STATE OF MICHIGAN

COURT OF APPEALS

MARY JURSTIK,

Plaintiff-Appellant,

v

CITY OF OWOSSO,

Defendant-Appellee.

UNPUBLISHED
May 22, 2008

No. 276701
Shiawassee Circuit Court
LC No. 06-004250-NO

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We affirm.

This negligence case arises out of injuries plaintiff suffered when she fell on defendant's sidewalk. On appeal, plaintiff argues that the injuries she sustained resulted from a "discontinuity defect" in the sidewalk of two inches or more and that governmental immunity therefore does not apply in this case. See MCL 691.1402a(2). In the alternative, plaintiff argues that even if the "discontinuity defect" was less than two inches, defendant's policy to repair defects greater than three-eighths of an inch rebuts the inference that the sidewalk where she fell was in reasonable repair.

This Court reviews de novo a lower court's determination regarding a motion for summary disposition. *Hinkle v Wayne County Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

Governmental agencies in Michigan are generally immune from tort liability for actions taken in furtherance of governmental functions. *Stringwell v Ann Arbor Public School Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004); MCL 691.1407(1). However, an exception exists for certain violations of the duty to keep a "highway in reasonable repair so that it is reasonably

safe and convenient for public travel." MCL 691.1402(1). "Highway" includes sidewalks. MCL 691.1401(e). A municipality faces liability for injuries proximately caused by defects in sidewalks if the municipality knew or should have known of the defect for at least 30 days before the incident. MCL 691.1402a(1)(a)-(b). Furthermore,

> [a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair. [MCL 691.1402a(2).]

In this case, both plaintiff's and defendant's actual measurements of the discontinuity were less than two inches. Plaintiff and her tenant Ronald Malinowski measured the discontinuity and plaintiff marked their ruler at one and seven-eighths inches. Defendant's employees photographed and measured the discontinuity. Their measurements were less than two inches, ranging from one inch to one and three-fourths inches on the east and west edges of the square where plaintiff fell.

Plaintiff argues that a genuine issue of material fact exists regarding this measurement. She claims her one and seven-eighths inches measurement was inaccurate because debris measuring at least one-eighth of an inch interfered with the measurement. However, plaintiff and Malinowski failed to measure or photograph the debris. Additionally, there is no indication that defendant's employees' measurements were taken while the debris was in place. Actual measurements control over estimates. *Baldinger v Ann Arbor R Co*, 372 Mich 685, 691 n 3; 127 NW2d 837 (1964); see also *Brown v Detroit United R*, 216 Mich 582, 584; 185 NW 707 (1921) ("guesses or estimates of plaintiff and her witness have no weight as against the positive testimony of actual measurements"). Therefore, this Court finds no genuine issue of material fact that the discontinuity was less than two inches; a rebuttable inference of reasonable repair existed.

Next, plaintiff contends that the inference of reasonable repair was rebutted because the discontinuity in the sidewalk where plaintiff fell violated defendant's policy to repair discontinuities greater than three-eighths of an inch. However, defendant's repair policy differs from the state's "policy" as set forth in MCL 691.1402a(2), and plaintiff fails to cite any binding authority that defendant's failure to repair was unreasonable in this case. As noted in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959), "[i]t is not sufficient for a party '. . . to announce a position or assert an error and then leave it up to this Court to . . . search for authority either to sustain or reject his position.'" The dissenting opinion on which plaintiff relies obviously does not constitute binding authority. Accordingly, we conclude that the trial court did not err when it granted defendant's motion for summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette